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No. _____

In The
Supreme Court of the United States
October Term, 1992

92-1642

LARRY MOOREHOUSE,

Petitioner,

v.

GRAND RIVER DAM AUTHORITY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a person is deprived of a liberty interest when his public employer releases to the media a third party's false and stigmatizing accusations about the person and then terminates him.

2. Whether a stigmatizing statement alone, without regard to its truth or falsity, published by a public entity in the course of termination, violates a liberty interest.

3. Whether a property right in continued employment can be secured by the chartering legislation of a public entity.

PARTIES

The participants in the proceedings below were:

Larry Moorehouse, Plaintiff/Petitioner

Grand River Dam Authority, a government agency of the State of Oklahoma; Henry Neftzger, individually and as General Manager for the Grand River Dam Authority; Billy Mac Thomison, individually and as a director of the Grand River Dam Authority; W. H. Langley, Jr., individually and as a director of the Grand River Dam Authority; Larry Hansen, individually and as a director of the Grand River Dam Authority; Marvin Hicks, individually and as a director of the Grand River Dam Authority; J. Milton Patrick, individually and as a director of the Grand River Dam Authority; John M. Turner, individually and as a director of the Grand River Dam Authority, Defendants/Respondents

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LARRY MOOREHOUSE,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Larry Moorehouse, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit entered in this proceeding December 4, 1992.

OPINIONS BELOW

The opinion of the United States District Court is set out at App. pp. 1-2 of the appendix hereto ("App."). The panel decision of the Tenth Circuit is set out at App. pp.

3-6. The order denying a petition for rehearing and suggestion of rehearing in banc is set out at App. pp. 7-8.

JURISDICTION

The decision of the Tenth Circuit was entered on December 4, 1992. The order denying a rehearing was entered on January 13, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the provisions of the 14th Amendment to the Constitution of the United States which provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and the provisions of 42 U.S.C. §1983 which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

A. The Proceedings Below

This case involves claims by a former employee of the Grand River Dam Authority ("GRDA") arising out of his discharge. On November 14, 1988, he filed a suit in the United States District Court for the Northern District of Oklahoma alleging a violation of his constitutional and statutory rights. For purposes of this petition, the relevant claims were that (1) Petitioner had been deprived of a property right in continued employment without due process of law, and (2) Petitioner had been deprived of a liberty interest without due process of law.

On December 6, 1991, the District Court granted summary judgment in favor of GRDA. On December 4, 1992, the Tenth Circuit affirmed the district court. A petition for rehearing and suggestion of rehearing in banc was denied by the Tenth Circuit on January 13, 1993.

B. Statement of Facts

GRDA is a public entity in Oklahoma chartered in 1935. It controls the water of the Grand River and generates electricity from water power and coal which it then distributes and sells. Okla. Stat. tit. 82, §861. Based on its chartering legislation, GRDA has the authority to set its

own policy for hiring and firing employees. The relevant statute states, in part: "The Board may appoint such officers, agents, and employees, fix their compensation and term of office and the method by which they may be removed, and delegate to them such of its power and duties as it may deem proper." Okla. Stat. tit. 82, §864. Through the years, GRDA adopted a policy and custom of giving all GRDA employees job protection and due process rights prior to termination. (Aplt. App. at 90-107, 114-115).[1]

In 1981, the Oklahoma Legislature enacted a law defining certain high-level positions at GRDA as "unclassified." Okla. Stat. tit. 74, §803.4 (1981); (current version at Okla. Stat. Ann. tit. 74, §840.8(16) (West 1992)).[2] Employees who held unclassified positions, like the Petitioner, supposedly had no job protection while classified workers had a property right in continued employment. This law attempted to modify GRDA's charter-based right to determine its own employment policies by imposing on it a scheme of classified and unclassified employees.

After the law was enacted, GRDA continued to act as if its charter-based right to set its own employment policies took precedence over the new law. For example, after

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[1] The Tenth Circuit requires the parties to prepare the record to be reviewed and compile it in an appendix. References to the Appellant's Appendix (Aplt. App.) should not be confused with any reference to the Appendix (App.) attached to this petition which contain orders from the courts below.

[2] The law was initially added to the Merit System of Personnel Administration Act which later became the Oklahoma Personnel Act. For simplicity, all references will be to the Oklahoma Personnel Act.

the law was passed, GRDA modified its by-laws to give its chief executive and eight other executives the right to only be fired for cause after proper notice and a hearing. (Aplt. App. at 154). In modifying its by-laws, GRDA disregarded the law which specifically defined these jobs as "unclassified" with no job protection. GRDA also continued its policy and custom of only firing its workers, classified or unclassified, for cause.

The Petitioner was hired in 1980 by GRDA and in 1981 became the acting plant superintendent for a GRDA coal-fired electrical generating plant. (Aplt. App. at 43-45). In 1982, he was officially made the permanent superintendent. (Aplt. App. at 46). The Petitioner was told by his boss that he had a job for the life of the power plant. (Aplt. App. at 47-49). A former GRDA chief executive and other top managers, including a former personnel manager, testified that through its policy and custom, GRDA created an expectation of due process and continued employment for all employees. (Aplt. App. at 90-107; 114-115).

Two years before the Petitioner's discharge, GRDA was informed by the State of Oklahoma that its unclassified workers may be entitled to due process before discharge. The directive was a result of this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). GRDA was instructed to implement procedures to provide employees, including some unclassified employees, with notice and opportunity to respond prior to discharge. (Aplt. App. at 59-60).

In 1987, the Oklahoma State Bureau of Investigation ("OSBI") began a criminal investigation of purchasing

irregularities at GRDA. The agents compiled statements from GRDA employees without verifying the information. The 1600-page confidential report was revealed to a meeting of the GRDA Board of Directors on December 2, 1987.

The Board then went into an executive session to discuss the OSBI report and termination of the Petitioner. The United States Magistrate assigned to this case determined the executive session was illegally and improperly convened. During that session, the former general counsel, who was then the assistant general manager of administration, advised the Board that unclassified employees, like the Petitioner, were entitled to a hearing where specific proof must be produced as to why he should be discharged. (Aplt. App. at 78-81). Furthermore, these unclassified employees were entitled to a hearing at the next regular board meeting. (Aplt. App. at 82). Based on the allegations contained in the OSBI report, the Petitioner was suspended with pay and constructively terminated on December 7, 1987. (Aplt. App. at 29-30, 32, 71). GRDA paid claims to two other employees terminated at the same time as the Petitioner based on the same OSBI investigative report. (Aplt. App. at 73). The employees released GRDA from all liability growing out of their employment with GRDA. (Aplt. App. at 110, 113).

Newspapers reported the Petitioner had been suspended with pay and ordered off the property in connection with the criminal investigation. The articles also said the OSBI report was provided to the district attorney for possible criminal prosecution. The defendants were the sources for the newspaper articles. (Aplt. App. at 73-75).

The Petitioner always disputed any charges of wrongdoing made against him in the report and requested a hearing. (Aplt. App. at 5; 84-89). When he would not resign, the Petitioner was terminated on January 31, 1988, without a hearing because of the OSBI investigation. (Aplt. App. at 72). No criminal charges were ever filed against the Petitioner.

In 1990, a state commission investigated GRDA for alleged violations of the Oklahoma Personnel Act. The commission investigated six major problem areas including GRDA's abuse of the classified/unclassified designations as set forth in the Oklahoma Personnel Act. The commission concluded that GRDA was willfully violating the Oklahoma Personnel Act. (Aplt. App. at 125-149).

The Tenth Circuit ruled the Petitioner had no property interest because he was an unclassified worker with no job protection. The Court also ruled his liberty interest had not been violated because GRDA made no false statements about the Petitioner. (App. pp. 5-6).

C. Federal Jurisdiction in the Court of First Instance

Jurisdiction of the United States district court was based upon 28 U.S.C. §1331 because a federal question was involved arising out of 42 U.S.C. §1983.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT HAS ESTABLISHED REQUIREMENTS FOR THE VIOLATION OF A LIBERTY INTEREST WHICH CONFLICT WITH THIS COURT

This case is important because the Court of Appeals for the Tenth Circuit has changed the rules under which a liberty interest is violated. The Tenth Circuit has held a public employer may release to the public false and stigmatizing accusations of a third party about an employee, terminate him and still not violate the employee's liberty interest as long as it did not make a false statement of its own. This holding conflicts with past decisions of this Court.

The parameters of a liberty interest claim arising from public employment began in *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) where the Court stated:

> For [w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.

Other cases since *Roth* have defined the elements of a violation of a liberty interest. In *Paul v. Davis*, 424 U.S. 693 (1976), this Court stated a defamatory and stigmatizing charge about a public employee violates a protected liberty interest when it occurs in the course of the termination of employment. *Id.* at 709-711. However, the stigmatizing statement must be disclosed publicly in order to violate a liberty interest. *Bishop v. Wood*, 426 U.S. 341, 348 (1976). Moreover, the stigmatizing statement must be false so that there is a factual dispute between an

employer and an employee which has some significant bearing on the employee's reputation. *Codd v. Velger*, 429 U.S. 624, 627 (1977). These holdings were applied in *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980). In *Owen*, this Court ruled the city deprived the plaintiff of his liberty interest without due process of law when it released to the public defamatory and stigmatizing charges arising out of a police investigation and then fired him. *Id.* at 633, n.13.

The Tenth Circuit has narrowly focused on the element of a liberty claim which requires the statement by the public employer to be false. It has wrongly concluded that if a public employer accurately reports to the public a third party's false and defamatory statements about an employee and then terminates him, no liberty interest has been violated. *Melton v. City of Oklahoma City*, 928 F.2d 920, 929, 931 (10th Cir. 1991) (in banc), *cert. denied*, 112 S.Ct. 296 (1991). In addition to the case at hand, the Tenth Circuit has followed this holding in *Primas v. City of Oklahoma City*, 958 F.2d 1506, 1510-1511 (10th Cir. 1992) and *Russillo v. Scarborough*, 935 F.2d 1167, 1171-1172 (10th Cir. 1991). These decisions are in conflict with this Court which has ruled that the falsity element is met when there is a factual dispute between the employee and employer which harms the employee's reputation. *Codd v. Velger*, 429 U.S. at 627; *Owen*, 445 U.S. at 633, n.13.

In the case at bar, the Tenth Circuit denied the liberty claim because the Petitioner failed to show that GRDA made any published statement that was either false and defamatory or made with duplicity. (App. p. 5). This conclusion was reached despite the fact that the Petitioner alleged the charges contained in the newspaper

articles and the OSBI investigative report were both false and defamatory. The Petitioner was suspended and terminated because of the stigmatizing charges.

The Tenth Circuit has created a hiding place for public employers. Under the decisions of the Tenth Circuit, a public employer can release to the public a third party's false accusations about an employee, fire the employee and then claim that the employee's liberty interest was not violated because it said nothing false and did nothing wrong. Surely, this is not the result this Court intended. To use a Biblical analogy, it is like the Roman official Pontius Pilate publicly washing his hands of any wrongdoing before he condemned Jesus to be crucified. Therefore because the Tenth Circuit has misapplied prior holdings from this Court, the writ should be granted to protect the liberty interest guaranteed by the Constitution and defined by this Court.

II. THE WRIT SHOULD BE GRANTED TO GIVE A PUBLIC EMPLOYEE THE RIGHT TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS PROTECTION IF HE IS STIGMATIZED BY HIS EMPLOYER DURING THE COURSE OF TERMINATION.

A person has a liberty interest in their good name, reputation, honor and integrity and in the right to take advantage of future employment opportunities. *Board of Regents v. Roth*, 408 U.S. at 573 n.12. If the stigmatization of a public employee occurs in the course of termination of employment, a §1983 liberty interest has been affected. *Paul v. Davis*, 424 U.S. at 710. State action may not deprive

a person of this liberty interest without certain procedural and substantive due process rights. A person is entitled to a name clearing hearing if he has been stigmatized during the course of termination. *Owen v. City of Independence, Mo.*, 445 U.S. at 633 n.13.

The Tenth Circuit has ruled in this case that a public entity may stigmatize an individual during the course of termination from employment as long as it accurately states the content of the stigmatizing information. The Petitioner has always challenged the truthfulness of the stigmatizing and defamatory allegations against him that were contained in the OSBI report. GRDA used the contents of the criminal OSBI investigation as the basis to terminate the Petitioner and publicized this fact. The Petitioner was never afforded the right to have a hearing to challenge the allegations, to confront his accusers, to cross-examine witnesses or to have a name clearing hearing even though those requests were made either during the course of his termination or through this lawsuit.

The Tenth Circuit, in its ruling, stated that:

> We also held that proof of stigmatization required proof of the publication of a *false* and defamatory statement or a true statement made with intent to harm the plaintiff's reputation. . . .
>
> Mr. Moorehouse fails to recognize that defendants made no public statement accusing him of any criminal or otherwise stigmatizing conduct.

App. p. 5 (emphasis added). As its authority, the Tenth Circuit cited to *Melton v. Oklahoma City*, 928 F.2d 920 (10th Cir. 1991) (in banc), *cert. denied*, 112 S.Ct. 296 (1991). (The

accurate reporting of a criminal accusation/investigation was not actionable under a liberty claim.) The Tenth Circuit has made clear through its ruling that for the Petitioner to state a valid claim, he must identify a false and defamatory statement made by GRDA and may not rely on the falsity or inaccuracy of the OSBI investigation that GRDA publicly referred to when it terminated him.

In its ruling, the Tenth Circuit has created the anomalous situation that a stigmatizing publication made in connection with the termination from employment is not actionable as long as the public entity accurately restates the stigmatizing information from the original source. According to the Tenth Circuit, nothing GRDA said was false because it accurately stated information from the OSBI report, despite what was said harmed the Petitioner's reputation, integrity, honor and affected his ability to take advantage of employment opportunities.

This Court should grant this writ to make it clear to public employers that statements during the course of termination which stigmatize a person, without regard to whether the employer has accurately restated a third party's allegation or not, are actionable under a §1983 civil rights action for violating a person's constitutional liberty rights. Substantive and procedural due process rights require that an accused be allowed to challenge the stigmatizing allegations against him that were used as the basis to terminate him. When a person is publicly discharged based on a criminal investigation, he has clearly been stigmatized. Fundamental fairness requires a hearing to challenge the accusations as the basis for terminating him or, at the very least, a hearing to restore his good name. The Tenth Circuit's ruling denies a person that

right. A person publicly shamed has no recourse. Because of the important legal and policy considerations to a liberty interest that this case establishes, this writ should be granted.

III. THE TENTH CIRCUIT HAS RULED THAT A PROPERTY INTEREST IN CONTINUED EMPLOYMENT, AUTHORIZED BY THE CHARTERING LEGISLATION OF A PUBLIC ENTITY AND CREATED BY ITS CUSTOM AND POLICY, IS NOT PROTECTED WHEN IT CONFLICTS WITH THE WORKER'S STATUS.

In order to have a property interest in employment, a person must have a legitimate claim of entitlement. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The existence of this property right is determined with reference to state law. *Bishop v. Wood*, 426 U.S. 341, 344 (1976). Usually, this interest arises from statutory or contractual limitations on the employer's ability to terminate an employee. *Id.* A property interest in employment can also be created by an implied contract, arising out of the customs, policies and *de facto* policies of the institution. *Perry v. Sindermann*, 408 U.S. 593, 601-603 (1972). When a property interest exists, the employee is entitled to a hearing or some form of due process before termination. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985).

In the case at hand, GRDA has always acted with the power to create its own employment policies. By specific statute arising out of its legislative charter, GRDA has the authority to determine its own employment policies. The Petitioner presented testimony from a chief executive and

top managers to show GRDA had for years created a policy and custom of only firing employees for cause.

In 1981, the Oklahoma Legislature defined certain positions, such as that of the Petitioner, as unclassified employees with no job protection. GRDA then disregarded the statute, amended its by-laws and gave several high officials, not including the Petitioner, job protection. Before the Petitioner was terminated, even GRDA recognized he had a property right in continued employment. For example, GRDA's former general counsel, who was then part of the administration, informed GRDA's Board of Directors that the Petitioner was entitled to a hearing before he could be terminated.

The Tenth Circuit, in a summary opinion, stated that the Petitioner's status as an unclassified worker meant he had no property interest. The Court held that his status as an unclassified worker controlled over all other matters including the 1935 chartering legislation, which gave GRDA the authority to set its own employment policies, and the custom and practice by GRDA of only firing for cause.

The charter of a public entity is controlling on the issue of an employee's property rights to continued employment. For example, the Tenth Circuit has held that, under Oklahoma law, a property right in continued employment cannot be created by a personnel policy when it conflicts with a city charter which provides that employees can be discharged for the good of the service. *Driggins v. City of Oklahoma City, Okl.*, 954 F.2d 1511, 1514 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 129 (1992). Similarly, the Tenth Circuit has held that city employees have a

property interest in continued employment to the extent the city charter limits its officials' power to terminate such employment. *Patrick v. Miller*, 953 F.2d 1240, 1244-45 (10th Cir. 1992).

In both *Driggins* and *Patrick, supra*, the Tenth Circuit held a city's charter determined the issue of property rights in continued employment. In the case at bar, the Tenth Circuit took an about-face turn when it held that a property interest cannot be created by an implied contract even though the charter of the public entity allows it to set its own employment policies. Apparently the Tenth Circuit has concluded that the Petitioner's status as an unclassified worker, which even GRDA blatantly ignored, outweighed the charter of a public entity which gave it the right to set its own employment policies and create a protected property right. The Tenth Circuit has created conflicting decisions regarding the establishment of a property interest. Moreover, lawsuits claiming the loss of a property right in employment continue to proliferate because of ambiguities which have arisen since this Court last addressed the issue. Therefore, this writ should be granted.

CONCLUSION

Based on the foregoing, the undersigned would respectfully submit that the petition for certiorari in this case should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY MOOREHOUSE, Plaintiff, vs. GRAND RIVER DAM AUTHORITY, a Government Agency of the State of Oklahoma, et al., Defendants.	)	No. 88-C-1529-E (Filed DEC 09 1991)

ORDER AND JUDGMENT

This matter is before the Court on Defendants' Motion for Summary Judgment. Plaintiff has initiated four causes of action: two federal claims for alleged violations of his procedural and substantive due process rights under 42 U.S.C. § 1983 and state claims for slander, libel and intentional infliction of emotional distress. Defendants argue that his claims should be dismissed because he has not established that he had either a constitutionally protected property interest in his at-will employment or a liberty interest that was infringed under the material and undisputed facts of the case. The Court agrees. The Court finds that evidence submitted by Plaintiff in support of his position is, at best, colorable but not sufficiently probative to withstand the motion. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Therefore, summary judgment is appropriate and should be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Because the federal claims are now dismissed the Court

declines to address the state claims on jurisdictional grounds and finds that the state claims should be dismissed as well.

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment is granted; the Plaintiff shall take nothing from Defendant; this action is hereby dismissed on the merits.

ORDERED this 6th day of December, 1991.

/s/ James O. Ellison
JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LARRY MOOREHOUSE,

Plaintiff-Appellant,

v.

GRAND RIVER DAM AUTHORITY, a government agency of the State of Oklahoma; HENRY NEFTZGER, individually and as General Manager for the Grand River Dam Authority; BILLY MAC THOMISON, individually and as a director of the Grand River Dam Authority; W.H. LANGLEY, JR., individually and as a director of the Grand River Dam Authority; LARRY HANSEN, individually and as a director of the Grand River Dam Authority; MARVIN HICKS, individually and as a director of the Grand River Dam Authority; J. MILTON PATRICK, individually and as a director of the Grand River Dam Authority; JOHN M. TURNER, individually and as a director of the Grand River Dam Authority,

Defendants-Appellees.

No. 92-5003
(D.C. No. 88-C-1529-E)
(N.D. Oklahoma)

(Filed DEC 04 1992)

ORDER AND JUDGMENT*

Before **MOORE** and **SETH**, Circuit Judges, and **CAMPOS**, District Judge.**

This is an appeal from on [sic] order granting summary judgment dismissing plaintiff's § 1983 complaint for denial of property and liberty interests without due process. Plaintiff, an unclassified employee of the Grand River Dam Authority (GRDA), a public entity within the State of Oklahoma, was suspended with pay, but ultimately terminated. GRDA contends the termination was the consequence of plaintiff's acceptance of other employment, but the actual reason for the termination is not significant to our disposition. Mr. Moorehouse contended his suspension and ultimate termination is attributable to a report filed with the GRDA by the Oklahoma State Bureau of Investigation. It is admitted plaintiff was accorded no pretermination hearing to either protect his alleged property interest or clear his name. The district court held plaintiff had neither a constitutionally protected property interest nor an infringed liberty interest

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

**The Honorable Santiago E. Campos, District Judge for the United States District Court for the District of New Mexico, sitting by designation.

under the facts alleged in the last amended complaint. We agree and affirm.

It is undisputed that Mr. Moorehouse was a nonclassified employee of GRDA. He attempted to avoid summary judgment on his claim of property deprivation by showing he had been led to believe he would have a permanent position, nonetheless. We have examined his arguments on this issue and conclude they are wholly without merit. This case is clearly governed by our prior holdings in *Dupree v. United Parcel Serv., Inc.*, 956 F.2d 219 (10th Cir. 1992); *Driggins v. Oklahoma City*, 954 F.2d 1511 (10th Cir.), *cert. denied*, 113 S. Ct. 129 (1992); and *Carnes v. Parker*, 922 F.2d 1506 (10th Cir. 1991).

Plaintiff's assertion of a liberty interest deprivation skirts *Melton v. Oklahoma City*, 928 F.2d 920 (10th Cir.) (en banc), *cert. denied*, 112 S. Ct. 296 (1991), in which we held a liberty interest claim first required proof of *both* stigmatization and deprivation of an opportunity of future employment. We also held that proof of stigmatization required proof of the publication of a false and defamatory statement or a true statement made with intent to harm the plaintiff's reputation. In this instance, plaintiff has failed to show that defendants made any published statement that was either false and defamatory or made with duplicity. This failure is fatal to his claim. *Primas v. Oklahoma City*, 958 F.2d 1506 (10th Cir. 1992).

Mr. Moorehouse fails to recognize that defendants made no public statement accusing him of any criminal or otherwise stigmatizing conduct. He also has not demonstrated defendants publicly embraced or asserted any false accusation as the cause of his discharge. Although

Mr. Moorehouse has pointed to discussions within GRDA of the report that led to his suspension, those discussions were neither published nor the basis for any punitive action against the plaintiff.

Mr Moorehouse asserts for the first time on appeal an argument that the defendant is estopped from asserting the defense that he was not entitled to the protections of the Oklahoma Merit System. We will not consider a non-jurisdictional issue which has not been first presented to the district court. *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1539 (10th Cir. 1992).

AFFIRMED.

Entered for the Court

John P. Moore
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LARRY MOREHOUSE,

Plaintiff-Appellant,

v.

GRAND RIVER DAM AUTHORITY, a government agency of the State of Oklahoma; HENRY NEFTZGER, individually and as General Manager for the Grand River Dam Authority; BILLY MAC THOMISON, individually and as a director of the Grand River Dam Authority; W. H. LANGLEY, JR., individually and as director of the Grand River Dam Authority; LARRY HANSEN, individually and as a director of the Grand River Dam Authority; MARVIN HICKS, individually and as a director of the Grand River Dam Authority; J. MILTON PATRICK, individually and as a director of the Grand River Dam Authority; JOHN M. TURNER, individually and as a director of the Grand River Dam Authority,

Defendants-Appellees.

No. 92-5003

ORDER
Entered January 13, 1993

Before McKAY, Chief Judge, SETH, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges, and CAMPOS*, District Judge.

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*The Honorable Santiago E. Campos, United States District Court for the District of New Mexico, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: Patrick Fisher
Patrick Fisher, Chief Deputy Clerk